SUBJECT: Continuing the State Bar of Texas

COMMITTEE: Government Organization: committee substitute recommended

VOTE: 7 ayes — Black, Finnell, Hartnett, A. Hill, Naishtat, Robnett, Smithee

0 nays

1 present, not voting — Gibson

1 absent — Stiles

WITNESSES: For — Charles R. (Bob) Dunn, Richard C. Hile, Karen Johnson, and Kirk Watson, representing the State Bar of Texas (15 other people representing the State Bar of Texas registered in support of the bill but did not testify); Richard Pena, Travis County Bar Association.

Against — Ray E. Dittmar, Network for Justice; James Rosenbloom, Texas HALT (Help Abolish Legal Tyranny); Judge Jim Coronado, Mexican-American Bar Association of Texas; Lou Louther

On — Joey Longley, Sunset Commission; Reggie James, Consumers Union; Tom Smith, Public Citizen.

BACKGROUND: The State Bar of Texas was created as a state entity in 1939. It is a public corporation and administrative agency of the judicial department under the oversight of the Supreme Court. Membership is mandatory for all licensed attorneys who wish to practice in Texas. About 55,000 lawyers are members. The bar has an annual budget of about $22.7 million, funded through membership dues (about 23 percent) and other revenue outside of the State Treasury and the appropriations process. The bar has 281 employees for fiscal 1991.

The State Bar is governed by a 42-member board of directors, 36 elected by the membership and six public members appointed by the Supreme Court (three of which are proposed by the governor) and subject to Senate confirmation.

Each of the 17 State Bar districts has at least one grievance committee (according to the Sunset Advisory Commission staff report, there are currently 46 local committees in operation), with a membership that must include at least one-third public members. If a complaint is found to be valid, the committee may issue private or public reprimands, require restitution, allow probation, or suspend or disbar the offender. If the attorney rejects the committee's decision, the State Bar's general counsel may file for a trial *de novo* in state district court, in which the complaint is heard anew. The Supreme Court has established a Grievance Oversight Committee of six lawyers and three public members to monitor the grievance process.

The Unauthorized Practice of Law Committee of the State Bar and the bar's general counsel investigate claims and file suit to enjoin non-members from practicing law.

The State Bar requires that each active attorney complete a minimum number of hours of continuing legal education every year. Those not subject to the requirement include judges, licensed attorneys who have chosen inactive status, persons with a physical or mental hardship, law school faculty and attorneys over age 70.

A Client Security Fund has been established by the State Bar to provide compensation to clients of attorneys who have committed offenses such as theft or embezzlement.

The bar previously underwent sunset review in 1979 and was continued until September 1, 1991.

DIGEST:

CSHB 1186 would continue the State Bar of Texas until September 1, 2003. It would also change the functioning of the bar in a number of ways:

Attorney discipline. A new Commission on Attorney Discipline would replace the Grievance Oversight Committee. The commission would be made up of six attorney members appointed by the bar president and six non-attorneys with no interest in the practice of law except as consumers, appointed by the Texas Supreme Court. The commission would select a

chief disciplinary counsel, subject to the advice and consent of the board of directors. The commission would also review the disciplinary process and report and recommend changes annually to the Supreme Court and the board of directors.

CSHB 1186 would require that the bar investigate all claims of attorney misconduct, determine whether grounds for a complaint exist, and provide an explanation to each complainant when a complaint is dismissed. Any party to a disciplinary hearing would be given at least seven days notice of any hearing where testimony was to be taken and would be allowed to attend. The bar would be required to provide quarterly reports of the status of any complaint to the complainant. The bill also requires the bar to take several steps to publicize the availability of the grievance procedure.

The bill would allow for interim suspension of an attorney who threatens immediate irreparable harm to a client. It would require distribution of a voluntary survey to complainants seeking their views on the disciplinary process. The bill would require an improved tracking system, periodic abstracts of the numbers of inquiries and complaints filed, regardless of what weight the complaints are given, and monitoring of complaints by category of offense, resolution and time required to dispose of the complaint.

The bill would establish an administrative grievance system, as an alternative to trial in district court, that would include a right of appeal under the substantial evidence rule (judicial review of the justification for the action) but not trial *de novo* (a completely new trial).

CSHB 1186 would forbid the use of more than one private reprimand within five years for disciplining an attorney for violation of the same disciplinary rule. It would forbid private reprimands for theft, failure to return an unearned fee or misappropriation of clients property entrusted to the lawyer.

Mediation and fee disputes. The bar would be required to establish a new procedure for voluntary mediation of complaints that are held not to allege an offense under the Rules of Professional Conduct. A standard fee dispute

resolution procedure would be establish that could be used by a bar committee or other organization as a model.

Mandatory pro bono. The bar would be required to report to the Supreme Court and the Legislature by January 1, 1993 on the advisability of a mandatory pro bono program (a program requiring attorneys to render some free services "for the public good") and ways to implement a program if it is desirable.

Unauthorized practice of law. The unauthorized practice of law committee and people working for it would be immune from damages for anything done in the work of the committee. Witnesses before this committee would have the same immunity as witnesses in a judicial proceeding. Records of the committee also would be exempted from the Open Records Act.

Legislative employee education exemption. Attorneys employed full time by the Legislature would be exempted from continuing legal education (CLE) requirements, other than one hour each year of legal ethics or professional responsibility.

Board of directors. The bill would require the bar to add four voting minority members, appointed by the bar president, to the 42-member board of directors. Minority members would be defined as including women and four ethnic minorities — African-, Hispanic-, native- and Asian-Americans.

The board of directors would be required to establish procedures for the public to have a reasonable opportunity to speak at board meetings. The bill also would allow the board of directors to hold emergency meetings by telephone conference call, with access for the public to hear the phone call and to hear a tape recording later.

Administrative provisions. The bar would be required to institute competitive bidding procedures, and to make a complete report of all income and expenditures annually to the Supreme Court, governor and each house of the legislature. The bar would be authorized to stagger the payment of dues throughout the year. Bar property would be held in trust for the state's lawyers if the bar ever ceased to exist. A career ladder and various other systems for improving employment practices would be

developed and reported on annually to the Supreme Court and the governor. The use of confidential information for the client security fund would be defined to not waive confidentiality or privilege. The number of signatures needed to add a candidate to the ballot for president-elect would be raised from 1 percent to 5 percent.

SUPPORTERS SAY:

CSHB 1186 offers a reasonable and balanced approach to continuing the operations of the State Bar of Texas.

Discipline. Issues such as fee disputes and allegations of malpractice or incompetence should be handled by the courts. Clients who are dissatisfied with the results of litigation often make such charges because they don't understand everything that has happened. If every dissatisfied client could set off an investigation and hearing simply by saying that their attorney charged too much or that the attorney did not perform adequately, the grievance procedure would be completely overwhelmed. Other licensing agencies do not consider these kinds of claims either — if a customer believes that a doctor or a plumber charged too much or did not perform adequately, then their remedy is in court. A recent survey of five major state bar discipline systems showed that Texas ranked second in the number of disciplinary actions as a percentage of membership and lowest in the cost per disciplinary action.

HB 1186 provides for referral of complaints to a voluntary mediation procedure in some cases. The mediation procedure must be voluntary because the only way that mediation systems will work is if both parties agree to be bound by it. Any mandatory mediation system would have to contain the same procedural features as the present court system.

The right to jury trial should not be eliminated from disciplinary proceedings — it offers the best due process protection against any erroneous or politically motivated disciplinary actions. Few disciplinary proceedings go to trial anyway because most lawyers wish to avoid bad publicity or fear that the discipline imposed by the court would be more severe. However, CSHB 1186 would require the establishment of an optional administrative procedure alternative, which would avoid trial *de novo*.

HB 1186 would significantly limit the use of private reprimands. Only one private reprimand would be allowed within a five-year period for an attorney who violated the same disciplinary rule, and private reprimands would be prohibited for more serious kinds of violations. Private reprimands are typically used for minor or technical violations that did not result in serious harm. Usually they are given to young lawyers as a warning, and they have been very effective in preventing any recurrence.

Records of public reprimands and disciplinary actions are already available to the public. Records of complaints filed should not be public information unless their revelation is found to be justified. Attorneys should not be stigmatized by complaints that are not found to have any merit. Even criminal-case defendants can have their record of arrest expunged if the case is later dismissed.

Control of the bar. The State Bar Act should not be repealed. While the bar could operate effectively under the sole control of the Texas Supreme Court, as some have suggested, the dual control by the Legislature and the Supreme Court serves the public interest and the real interest of the bar by allowing for better public input and oversight. The reforms made in this bill are a good example of the kinds of oversight that the Legislature and the sunset process can offer, and the bar does not want to avoid or do without this kind of scrutiny.

Non-regulatory functions. There is no need to separate any promotional functions of the bar or to limit its permissible activities, since the bar already focuses almost entirely on regulation and activities that serve the public interest. The non-regulatory functions of the bar are not "trade-association" functions. They include programs to educate the public on legal issues, to provide continuing education legal programs and to study the law and recommend changes to make it more responsive and less confusing. These programs improve the quality of legal service and the administration of justice, and do not serve solely to further the financial interest of lawyers. Having a unified State Bar allows the bar to use voluntary work by thousands of lawyers to accomplish these programs in the public interest. A divided bar would have to rely entirely on paid professional staff and would thus be more expensive.

Client security. The Client Security Fund should not be required by statute nor should its limits be changed. The fund is a voluntary effort by attorneys to compensate clients for intentional theft by their attorneys. It was never meant to compensate for unlimited losses even in that category, and it was never meant to compensate at all for negligence or malpractice. Those areas are properly compensated by malpractice insurance. The bar cannot serve as malpractice insurer for the whole state, nor should the bar be required to go beyond the voluntary effort it is already making. Most other professions do not provide any fund of this type. It is not fair to make the bar pay for the negligence or malpractice of an attorney any more than it would be fair to make the medical profession or accountants pay for negligence or malpractice by their individual members.

Discipline commission make-up. CSHB 1186 would provide for a Commission for Lawyer Discipline made up of six lawyers and six non-lawyers. The non-lawyers would be people with no interest in the practice of law except as consumers. The make-up of the new Commission for Lawyer Discipline would help assure that discipline is carried out in the public interest.

Open records. All bar records now are subject to the Open Records Act except applications for certification of specialization and some of the records of disciplinary proceedings. Those exceptions serve to protect attorneys who are applying for a recognition of specialization from having that information used against them and to protect attorneys from being stigmatized by complaints that have not been found to have any merit. (An author's floor amendment will propose deletion of the committee substitute provisions exempting the Unauthorized Practice of Law Committee from the Open Records Act.)

Unauthorized practice. Repeal of the laws restricting unauthorized practice of law would hurt consumers. It would be completely contradictory to impose a number of regulatory requirements on lawyers — grievance procedures, continuing legal education and fiduciary responsibility — then allow someone who is not a lawyer and is not subject to all of those requirements to practice law. It is easy to talk about non-lawyers who are competent to handle simple legal matters for low fees, but there really are no "simple" legal matters. A legal question like a will or

filling out an immigration form often seems simple but contains traps or problems that require expert knowledge. Even all the requirements for training and ethical responsibility placed on lawyers do not always assure that the client is competently represented. Allowing people to practice law without any of these requirements would just ensure a high level of incompetent representation and charlatans.

Pro bono. A mandatory pro bono service requirement may or may not be a sound idea — the bill would provide that the bar evaluate this proposal. Some have suggested that such a requirement might be found unconstitutional, as involuntary servitude. Any significant amount of time required to be contributed for voluntary work might be a real hardship for struggling attorneys in solo practice or small firms because they would lose their income for the time they were required to work for free. The bar already has several programs in place to encourage attorneys to do pro bono representation and allocated more than $4 million last year from Interest On Lawyers Trust Accounts to various projects providing legal assistance to the indigent. If there is to be a mandatory pro bono requirement, the bar needs to identify or create referral systems that can connect attorneys to indigent clients and to figure out how verify that each attorney has performed the required amount of pro bono work. The bar also has to consider the cost of the referral and verification programs. No other profession requires its members to provide free services on a regular basis. A mandatory pro bono program is something that should more appropriately be decided by the bar rather than the Legislature.

Funds. There is no reason to shift State Bar funds to the Treasury and then appropriate them back to the bar. These funds are raised from lawyers for the bar and should not be considered part of state general revenue. The Legislature probably would never attempt to use bar funds for any other purpose or to use control of funding for political reasons, but it makes good sense to put that temptation out of reach.

Oversight of the bar's funds is already adequate. The bar has been subject to audits by the state auditor since 1979 and is now independently audited. Furthermore, CSHB 1186 would requires a complete accounting for all income and expenses on an annual basis. No problem has been found in

regard to the bar's funds; why change a system that has worked perfectly well for decades?

Board. Putting the minority members on the board of directors would be a constitutionally permissible effort to remedy past discrimination against women and minorities and a laudable effort to integrate women and racial minorities into the bar leadership. Four minority members on a 46 member board is far less than proportional representation and is not meant to replace a general effort to integrate women and minorities into all aspects of the bar, including the board of directors as required by the State Bar Act.

Legislative exemption. Attorneys who work for the Legislature should be exempted from continuing legal education requirements. Legislative experience helps make them aware of new developments in the law, and their jobs already require that they keep up to date.

OPPONENTS SAY:

This bill would continue to give attorney a special protected status that other professionals do not enjoy and would not serve the best interests of the public.

Discipline. The scope of what may be considered in a grievance should be expanded. Most "inquiries" concerning consumer complaints against lawyers are dismissed because they do not fall within the narrow limits of violations of the Code of Professional Responsibility. Common issues such as overcharging and fee disputes, failure to communicate or return phone calls, and malpractice and incompetence are all held to not constitute a grievance that the bar will even investigate. HB 1186's provision for a referral to voluntary arbitration would work well for the few attorneys who agree to go to arbitration, but would not have any impact on attorneys who are acting in bad faith, or those who realize that arbitration is not in their best interest.

The grievance process should use a standard administrative procedure similar to other agencies, and the system abolish the attorney's right to trial *de novo* in district court. The current system allowing for trying a case *de novo* is largely responsible for the long delays in disciplinary proceedings and is just one more way that the system is biased in favor of attorneys.

Every other licensing agency in the state has a provision that puts the burden in any appeal on the licensee. The trial *de novo* provision means that the attorney can simply refuse to accept the discipline and force a completely new trial. Texas is the only state that requires trial de novo of disciplinary proceedings.

Private reprimands should be eliminated. No other agency in Texas uses private reprimands, and there is no good argument to defend them. Consumers should be allowed to find out if other clients have been dissatisfied with an attorney. If consumers wants to buy a toaster or a dishwasher, they at least can read Consumer Reports, but in hiring an attorney, there is almost no way to find out whether other people have generally been satisfied. The public should allowed access over the telephone to information about the number of complaints filed against an attorney, and the resolution of those complaints.

Control of bar. The State Bar Act should be repealed, as was recommended by the Sunset Advisory Commission staff report. There is fundamental conflict of interest in having a self-governing association of professionals regulating themselves with no governmental oversight by an independent agency. The regulatory functions of the bar should be separated from its functions as a promotional organization for the legal profession. In the alternative, the bar should be limited to activities of a regulatory nature or in the public interest. The bar is the only state agency that combines both kinds of activities. It is the only closed- shop union in this open-shop state.

The bar should be left under the oversight of the Supreme Court. The court has repeatedly held that it has ultimate authority over the bar and can reverse or modify any regulation by the Legislature. The Legislature should not continue to make it appear that it regulates the bar when the Supreme Court has actual control, and more importantly, should not continue to allow the bar to exercise executive branch powers.

The current system may violate the separation of powers doctrine in Art. 2 of the Texas Constitution, which clearly divides Texas government into three branches and states that "no person, or collection of persons shall exercise any power properly attached to either of the others . . ." The

Supreme Court has repeatedly held that the bar is an essential part of the judicial branch, yet the bar continues to exercise executive branch functions by regulating the profession.

Client security. The Client Security Fund, which compensates clients for malfeasance by attorneys, should be required by statute, and its existence should be more widely publicized. The limit for compensation should be increased from $25,000 to $50,000 and the limitation of $5,000 on unearned fees should be removed. These changes would not significantly increase the cost of the program, and are in line with the programs in many other states.

Discipline commission. Regulation of attorney misconduct should be accomplished by an agency dominated by non-attorneys. There is an inherent conflict of interest in attorneys presiding over their own disciplinary proceedings, and the present control of the bar by attorneys results in disciplinary proceedings that are skewed in favor of attorneys. A regulatory agency made up of non-attorneys would have to rely on expert advice of attorneys concerning legal issues, just as a court relies on medical experts in many cases.

The provisions in the original bill requiring all complaints to be investigated by professional staff would have helped avoid the problem of lawyers being investigated by their friends and colleagues in the local bar committees, but they were deleted from the committee substitute.

Open records. The bar should also be required to accept the applicability of the Open Records Act and to seek public input for its decisions and regulations rather than seeking to avoid or ignore it. At present, the bar has no provisions for public input into rule-making and does not seek public input in any way. The bar has refused to release its records concerning unauthorized practice of law activities, despite the provisions in the State Bar Act requiring disclosure. The committee substitute would make this even worse by adding a section authorizing the bar to keep records on unauthorized practice of law secret.

Unauthorized practice. The laws limiting the practice of law to lawyers should be repealed or significantly limited. These laws do not serve any

demonstrable public interest. Rather they enforce the bar's monopoly on all aspects of legal work, and prevent the use of less expensive alternatives. What constitutes the "practice of law" is defined very vaguely and very broadly, and may include simply providing a legal form. Vast numbers of people are unable to afford any legal representation at all, when low cost paralegals or others could perform much of the necessary legal work for reasonable fees if allowed to.

Pro bono. The requirement for a two-year study of whether to require attorneys to perform free (*pro bono*) services is an excuse for continued inaction. Attorneys should be required to perform a certain amount of free legal work each year for indigent clients. This requirement of a contribution to the legal system would be a fair exchange for lawyers' use of the legal system for their benefit and livelihood. The bar's code of ethics already encourages attorneys to do their share of providing legal assistance to the indigent, but it is widely ignored because it is not an enforceable rule.

The bar's efforts to avoid mandatory *pro bono* are just another example of the way the bar protects the self-interest of lawyers over the interests of the public. A system of mandatory pro bono would only force lawyers to live up to the rules that they claim to follow. It would relieve some of the pressure on lawyers who now do more than their share of pro bono, and would only be an inconvenience to lawyers who fail to do any significant amount of free work. Such a system has been in place locally in El Paso for many years and has worked very well. After its study, the bar would probably put the issue to a membership vote, and lawyers will vote against it because it is against their self interest.

Funds. State Bar funds should be placed in the Treasury, appropriated by the Legislature and audited by the state auditor, just like the funds for any other state agency. The Sunset Advisory Commission staff report recommended this change because the current system does not provide adequate accountability.

Board. No matter how well intentioned, the provision for four minority members on the bar's board of directors is surely unconstitutional and

violates the provision in the State Bar Act that officers shall be selected without regard to race, sex, or similar criteria.

Exemption. There should be no exemption from continuing legal education for attorneys employed by the Legislature. Working for the Legislature does not ensure that attorneys are aware of new developments in their area of the law any more than working as a briefing attorney or in private practice. Many new developments in the law come not from the Legislature but from court decisions, other states, regulations, and federal law.

NOTES:

Floor amendments. The author, Rep. Hury, plans to submit a floor amendment that would delete the committee substitute provisions concerning exemption of unauthorized practice of law records from the Open Records Act.

Rep. Price plans to offer a floor substitute for CSHB 1186. It would restructure the present disciplinary procedures, placing them under the control of a five-member board appointed by the governor, including at least four non-lawyers. The amendment would make all disciplinary records public with very narrow exceptions and would make information about individual lawyers available by phone. It would require all contracts for legal services to be made in writing. It would also create class A misdemeanor offenses for 17 different unethical acts by attorneys including charging for work that is not necessary or is not performed, failure to respond to a customer's reasonable request for information in a timely manner, failure to perform in a timely manner, or performing legal services in a negligent manner. An office of investigation and conciliation, funded by assessments on attorneys, would be charged with the mechanics of investigating consumer complaints against lawyers, informal attempts at conciliation and referral to an office of arbitration where a non-lawyer arbitrator would hold a quick, informal hearing and issue a binding decision with very limited rights of appeal.

Comparison to original bill. CSHB 1186 differs from the original version of the bill in the following significant ways: The substitute would require the bar to use competitive bidding procedures, allow the board of directors to hold emergency meetings by telephone and require distribution of a

survey to all complainants. The substitute deleted provisions forbidding lobbyists to serve on the board of directors and shifted responsibility for unauthorized practice of law from the general counsel to the new chief disciplinary counsel. The substitute added "within five years" to the prohibition on more than one private reprimand for the same kind of offense. The substitute added the requirement for the bar to establish voluntary mediation procedures for complaints that are found not to constitute grievances.

The original bill would have allowed the new Commission on Lawyer Discipline to choose the chief disciplinary counsel; the substitute would require that the choice be with the advice and consent of the bar board of directors. The substitute added the provisions for immunity from damages for the unauthorized practice of law committee and witnesses. The substitute deleted a provision that would place the bar's Client Security Fund into statute, leaving it a purely voluntary effort. The substitute deleted provisions in existing statutes that authorize and define local grievance committees. The substitute added the provision exempting attorneys employed by the legislature from most of the continuing legal education requirements.

Other bills. The companion bill, SB 568 by Green, is similar to the original version of HB 1186. It would require the bar to keep records of all complaints, no matter whether they allege a violation of disciplinary rules, and to furnish information concerning the number of complaints, nature of complaints and their resolution to any member of the public concerning any attorney. It would make all disciplinary proceedings public and would allow complainants to discuss their complaints without fear of sanction, retaliation or liability. SB 568 was referred to a subcommittee of the Senate Jurisprudence committee on March 12

SB 915 by Barrientos would require the bar to achieve an 80 percent rate of attorneys performing at least 50 hours of *pro bono* work. It would also require provisions for attorneys to "buy out" of the requirement and for exceptions in some cases. SB 915 was referred to the Senate Jurisprudence Committee on March 11. A similar bill, HB 2276 by Naishtat, was referred to the Judicial Affairs Committee on March 21.

HB 1402 by Brimer would create a six-person commission of non lawyers to oversee a revised grievance procedure based on standard administrative procedures and similar to other licensing agencies. HB 1402 was tabled in a subcommittee of the Government Organizations committee on March 20, 1991.

HB 1200 by Carter and SB 510 by Green are companion bills that forbid state agencies and local governments from hiring attorneys through competitive bidding processes. HB 1200 was reported favorably without amendment from State Affairs on April 8. SB 510 is scheduled for public hearing in the Senate State Affairs Committee today.

Sunset recommendations. The original version of HB 1186 generally reflects the recommendations of the Sunset Advisory Commission. The commission rejected the major recommendations for change made in the staff report on the State Bar. The staff report recommended repeal of the State Bar Act, which would place regulation of the legal profession under the Supreme Court.

If the Legislature decided to continue to regulate attorneys by statute, the staff report recommended that the professional association aspects of the bar not be regulated by statute, leaving to the Supreme Court to decide whether the regulatory arm and professional association should be unified or separate.

If the other changes were not made, the staff report recommended that State Bar funds be placed in the State Treasury and subject to the appropriations process. It also recommended that the State Bar publicize the complaint and grievance process, that the State Bar establish a standardized process for processing and investigating complaints, that complaints be resolved using an administrative process, with complaints appealable to the Grievance Oversight Committee and ultimately to the Supreme Court, that all final disciplinary actions against attorneys be publicly disclosed and that the complaint tracking system be improved. The staff report also recommended that the Client Security Fund be established in statute and the minimum payment structure revised.